IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

APPEAL NO.169 OF 1999

IN

SUIT NO.503 OF 1980

...

Mahadev Pandurang Kambekar
since deceased through his
heirs & legal representatives namely,
1A. Smt.Bhimabai Mahadeo Kambekar
1B.Narendra Mahadeo Kambekar
1C.Jayshree Mahadeo Kambekar
1D.Triveni Mahadeo Kambekar
1E.Kohinoor Mahadeo Kambekar
1F.Snehalata Madhukar Kini
1G.Smt.Chhaya Arjun Mukadam
All residents of Mumbai ...Appellants

v/s.

Shree Krishna Woollen Mills ...Respondent

...

Mr.Uday Bobde i.b Y.R. Shah for the Appellants.

Mr.Komal Bulchandani i/b Komal & Co. for the Respondent.

WITH

APPEAL NO.199 OF 1999

IN

SUIT NO.503 OF 1980

...

Shree Krishna Woollen Mills ...Appellant

v/s.

Mahadev Pandurang Kambekar
since deceased through his
heirs & legal representatives namely,
1A. Smt.Bhimabai Mahadeo Kambekar
1B.Narendra Mahadeo Kambekar
1C.Jayshree Mahadeo Kambekar
1D.Triveni Mahadeo Kambekar
1E.Kohinoor Mahadeo Kambekar

1F.Snehalata Madhukar Kini

1G.Smt.Chhaya Arjun Mukadam

All residents of Mumbai ...Appellants

...

Mr.Komal Bulchandani i/b Komal & Co. for the Appellant.

Mr.Uday Bobde i/b Y.R.Shah for the Respondent.

...

CORAM: D.K.DESHMUKH &

J.H.BHATIA, JJ.

DATED: 19TH JULY,2007

JUDGMENT: (PER D.K.DESHMUKH, J.)

1. Both these Appeals challenge the same judgment of the learned single Judge of this court passed in Suit No.503 of 1980. That suit was filed by Shree Krishna Woollen Mills, where Mr.Mahadev Pandurang Kambekar was joined as a Defendant. (For the sake of convenience, in this judgment the parties are referred as Plaintiff and Defendant).

2. The Plaintiff filed the suit for a decree of specific performance of the contract, where as in the same suit the Defendant filed a counter-claim seeking a decree of possession. The learned single Judge has decreed the claim of the Plaintiff and has passed a decree of specific performance in favour of the Plaintiff and has also allowed the counter claim and has passed a decree of possession in favour of the Defendant. Therefore, both the Plaintiff and the Defendant have challenged the judgment and decrees passed by the learned single Judge by filing these two Appeals.

3. Admittedly, the Defendant is the owner of the land being survey No.58 and survey No.60 at Nahur-Bhandup in Bombay Suburban District. After the City Survey, those survey numbers are numbered as CTS No.741, 741/1 to 741/7. The Defendant by an indenture of lease dated 20-6-1958 granted lease of the suit land in favour of the Plaintiff for a period of 99 years. The rent payable by the Plaintiff was Rs.410/- per month. Clause (7) of the lease deed provided that within 20 years from the date of the lease the Plaintiff can exercise an option for

purchasing the suit land for Rs.82,016/- by giving a notice of his intention to do so to the Defendant. Clause (4) of the lease deed provided that if the agreed rent is not paid by the Defendant for a period of 12 months or more and if the Plaintiff-lessee commits breach of any condition of the lease, the Defendant would be entitled to forfeit the lease and then would be entitled to the possession of the suit land. It is these two clauses of the lease deed which are really relevant and significant in so far as these Appeals are concerned.

. In exercise of the option given to the Plaintiff by clause (7) of the lease deed, the Plaintiff addressed a letter dated 3-2-1978 to the Defendant calling upon him to make out a marketable title and execute a conveyance of the land in favour of the Plaintiff against payment of Rs.82,016/-. The response of the Defendant was that the land leased to the Plaintiff is only 14912 sq.yards, whereas the Plaintiff has encroached upon and is presently occupying the land admeasuring 21577.63 sq.yards., and therefore, the Defendant is willing to execute a sale deed of the land admeasuring 14912 sq.yards and that the Plaintiff should deliver possession 6666

sq.yards of the land which is encroached upon by the Plaintiff to the Defendant. There was some correspondence between the parties in relation to carrying out joint survey of the land, but ultimately joint survey was not carried out. The Defendant also did not execute a conveyance, therefore, the Plaintiff filed the suit seeking a decree of specific performance of the agreement contained in clause 7 of the lease deed.

4. The Defendant filed written statement and a counter claim. The counter claim of the Defendant was that the Plaintiff has not paid the rent from 20th September, 1978 till 19th February, 1980, therefore, in terms of clause (4) of the lease deed the lease is forfeited. The lease stand terminated and therefore the Defendant is entitled to possession of the leased property.

5. The Plaintiff filed written statement to the counter claim filed by the Defendant. The defence of the Plaintiff was that after having exercised the option under clause (7) the Plaintiff was not liable to pay any rent and therefore, there is no question of there being any default committed by the Plaintiff

in payment of rent and therefore, there is no question of lease being forfeited, the Defendant raised some other defences also.

6. The parties, thereafter, filed some documents. The court on the basis of the pleadings framed following issues:

I S S U E S

1. Does Defendant prove that Plaintiffs have committed breach of the agreement contained in lease by making default in payment of rent from 20th September, 1978, till 19th February, 1980, and thereby he has lawfully terminated the leave?

2. Does Defendant prove that the Plaintiff is in possession of excess land of 6666 sq.yards?

3. Whether Plaintiffs prove that they are/were ready and willing to perform their part of the contract and Plaintiffs performed the same is accordance with the stipulations in the lease agreement?

4. Are Plaintiffs entitled to specific performance of the Agreement?

5. Whether Defendant is entitled to compensation at the rate of Rs.6000/- per month?

6. What decree or order in the suit as well as in the counter claim?

7. The Plaintiff led oral evidence of one Mr.Krishana R. Sood and the Defendant examined himself. The court decided the suit by its judgment dated 24-12-1998. In so far as the Plaintiff's suit for decree of specific performance was concerned, the learned single Judge held that the only defence raised on behalf of the Defendant was that the Plaintiff has not been able to show that it is ready and willing to perform its part of the contract and therefore Plaintiff is not entitled to a decree of specific performance. However, according to the learned single Judge, the Plaintiff has proved that the Plaintiff was always ready and willing to perform

his part of the contract and therefore the learned single Judge passed a decree of specific performance in favour of the Plaintiff. The learned single Judge also held that the Defendant was not justified in saying that the Plaintiff has encroached upon any land belonging to the Defendant.

. So far as the counter claim is concerned, the learned single Judge held that the Plaintiff was not justified in saying that after exercise of option under Clause (7), the Plaintiff ceased to be liable to pay the rent. It was held that the Plaintiff admits that the Plaintiff has not paid rent for a period of more than 12 months and therefore, the lease is forfeited. The counter claim of the Defendant, thus, was allowed and decree of possession was passed in favour of the Defendant.

8. Now, taking up the Appeal filed by the Plaintiff challenging the decree passed in the counter-claim filed by Defendant first for consideration, the learned counsel appearing for the Plaintiff urged several contentions including a contention based on provisions of Section 144 of the Transfer of Property Act. The learned Counsel also relied on a judgment

of the Supreme Court in the case of R.S.Lala Praduman Kumar v/s. Virendra Goyal (AIR 1969 SC 1349), where the Supreme Court has held that covenant of forfeiture of tenancy for non-payment of rent is merely a clause for securing payment of rent and unless the tenant has by his conduct disentitled himself to equitable relief the Courts should grant relief against forfeiture of tenancy on the tenant paying the rent due, interest thereon and costs of the suit. He also urged that because the counter claim of the Defendant was really a suit filed by the Defendant for a decree of eviction against the Plaintiff, considering the relationship of landlord and tenant between the parties, in view of the provisions of Bombay Rent Act, which was then in force, the suit would not be maintainable in this court. In the alternative, he submitted that in any case in view of the provisions of Section 41 of the Presidency Town Small Causes Court Act, the suit of the Defendant for decree of possession would not be maintainable in this court, as the Small Causes Court has exclusive jurisdiction to try a suit filed by a landlord for a decree of possession against a tenant.

9. The learned Counsel appearing for the Defendant,

so far as first submission made by the learned counsel appearing for the Plaintiff is concerned, submitted that because of the conduct the Plaintiff has disentitled himself to any equitable reliefs from the court. So far as the submission of the Plaintiff that the suit would not be maintainable in this court because of the provisions of the Bombay Rent Act is concerned, the learned Counsel submits that in the written statement filed to the counter claim the Plaintiff did not urge that the relationship between the parties will be governed by the provisions of the Bombay Rent Act and therefore, the Plaintiff cannot be permitted to urge that contention for the first time in this court. The learned Counsel submitted that had that contention been raised in the written statement, it was possible for the Defendant to show that considering the purpose for which the lease has been granted, the relationship between the parties is not governed by the provisions of the Bombay Rent Act. So far as submission of the learned Counsel appearing for the Plaintiff that the suit is not maintainable in view of the provisions of Section 41 of the Presidency Small Cause Courts Act is concerned, the learned Counsel firstly submitted that this contention has also not been raised by the

Plaintiff in his written statement filed to the counter claim. He also submits that under Section 41 of the Presidency Small Cause Courts Act, the suit filed by the landlord against the tenant is maintainable, however, relying on the judgment of Supreme Court in the case of R.V.Bhupal Prasad v/s. State of Andhra Pradesh and ors., AIR 1996 SC 140, he submitted that a tenant whose tenancy has been forfeited does not remain a tenant and therefore, a suit against him for a decree of eviction would be maintainable in this court.

10. We propose to take up the third submission made by the learned Counsel appearing for the Plaintiff for consideration first. It is true that in view of the provisions of Section 41 of the Presidency Small Cause Courts Act, the counter claim of the Defendant for a decree of eviction against the tenant is not maintainable in this court is not raised by the Plaintiff in the written statement to the counter claim. However, in our opinion, despite that the Plaintiff is entitled to urge that contention in appeal for the first time because the facts that are necessary for deciding that contention can be culled out from the counter claim filed by the Defendant

himself. In the counter-claim filed by the Defendant, the Defendant admits the relationship between the parties. The Defendant admits that the Defendant is the owner of the property and that the Defendant has granted lease of the property for a period of 99 years in favour of the Plaintiff. Thus, so far as characters of the parties are concerned, i.e. landlord and tenant are admitted by the Defendant himself. Thus, this is a suit filed by a landlord for a decree of eviction against the tenant/lessee. Whether after forfeiture of the lease or termination of the lease the Plaintiff continues to be a tenant for the purpose of Section 41 of the Presidency Small Cause Courts Act or not is a different question and for deciding that question pleadings of the parties are not really relevant. For the purpose of deciding this contention the pleadings in the counter claim of the Defendant can be taken at their face value and therefore, in our opinion, the Plaintiff is entitled to urge this contention. For the purpose of deciding this question following facts are relevant, a) that the Plaintiff in the counter-claim is the owner of the land which was given on lease to the Defendant in the counter claim, therefore, the Plaintiff in the

counter-claim is the landlord; b) that the Defendant in the counter-claim was given the land on lease by the owner, therefore, the Defendant in the counterclaim is a lessee//tenant of the Plaintiff in the counter claim; c) that the Plaintiff in the counter claim has sought a decree of possession against the Defendant in the counter-claim on an allegation that the lease of the Defendant in the counter-claim is forfeited or terminated. All these aspects are stated by the Defendant himself in his counter-claim. So far as the jurisdiction of this court to entertain civil suits is concerned, it is governed and regulated by Clause 12 of the Letters Patent. Clause 12 of the Letters Patent reads as under:-

> 12. Original jurisdiction as to suits
>
> And We do further ordain that the said High Court of Judicature at Bombay, in the exercise of its ordinary original civil jurisdiction, shall be empowered to receive, try, and determine suits of every description, if, in the case of suits for land or other immoveable property such land or property shall be

> situated, or in all other cases if the cause of action shall have arisen, either wholly, or, in case the leave of the Court shall have been first obtained, in part, within the local limits of the ordinary original jurisdiction of the said High Court or if the defendant at the time of the commencement of the suit shall dwell or carry on business, or personally work for gain, within such limits, except that the said High Court shall not have such original jurisdiction in cases falling within the jurisdiction of the Small Cause Court at Bombay, or the Bombay City Civil Court. (emphasis supplied)

11. Perusal of above quoted clause 12 of the Letters Patent shows that this court has the jurisdiction to entertain civil suits of all description, but that jurisdiction does not extend to the civil suits which are within the jurisdiction of the Small Causes Court. So far as jurisdiction of the Small Causes Court to entertain the suit is concerned, for the purpose of these Appeals it is sub-section 1 of

Section 41 of the Presidency Small Cause Courts Act which is relevant. It reads as under:-

> S.41(1) Notwithstanding anything contained elsewhere in this Act or in any other law for the time being in force, but subject to the provisions of sub-section (2), the Court of Small Cause shall have jurisdiction to entertain and try all suits and proceedings between a licensor and licensee, or a landlord and tenant, relating to the recovery of possession of any immovable property situated in Greater Bombay, or relating to the recovery of any licence fee or charges or rent therefore, irrespective of the value of the subject-matter of such suits or proceedings.

12. Perusal of the above quoted provision of Section 41(1) of the Presidency Small Cause Courts Act shows that jurisdiction is conferred by that section on the Small Cause Court to entertain and try all suits between the landlord and tenant relating to recovery of possession of any immoveable property situated in Greater Bombay. There is no dispute that the suit property is immovable property and that it is

situated in Greater Bombay. The only dispute is whether even after termination of the lease of the Plaintiff by the Defendant, does the Defendant continue to be the landlord and the Plaintiff continue to be the tenant for the purpose of Section 41 of the Presidency Small Cause Court Act. So far that question is concerned, that question is no more res-intigra in as much as, that question has been clearly considered and decided by the Division Bench of this Court in the case of Nagin Mansukhlal Dagli v/s. Haribhai Manibhai Patel, AIR 1980 Bombay 123. Observations made by the court in paragraph 8 of that judgment are relevant. They read as under:-

> 8. The next point urged before us by Mr.Sanghavi was that Section 41 in terms applies to a licensor and a licensee and does not refer to the case of persons who once held the relationship of licensor and licensee but such relationship had come to an end either by the period of the licence expiring by efflux of time or by the termination of the licence. With respect to this submission the first point to be noted is that the section applies not only to suits between licensors and licensees but also between landlords and tenants in cases where the Rent Act does not apply. Further, the section does not refer to only one category of suits but to several categories. These categories are:
>
> (1) suits between a licensor and licensee relating to the possession of any immovable property situated in Greater Bombay.

(2) Suits between a landlord and tenant relating to the possession of any immovable property situated in Greater Bombay.

(3) suits relating to the recovery of the licence fee or charges in respect of such immovable property, and

(4) suits relating to the recovery of rent in respect of such property.

Now, a suit for the recovery of licence fee or charges may lie either when a licence subsists or after it has come to an end, and similarly a suit for the recovery of rent may lie either when the tenancy subsists or after it has come to an end, but it is difficult to envisage a case where during the subsistence of a licence a licensor can file a suit for the recovery of immovable property from the licensee or where during the subsistence of a tenancy a landlord can file a suit against his tenant for the recovery of immovable property given or tenancy to his tenant. If a licensor or a landlord wants to recover possession of the property, his right to do so arises only on the termination of the licence or the tenancy, as the case may be, or upon the licence or the tenancy determining by efflux of time subject to the provisions of the Bombay Rent Act. Mr.Sanghvi, however, submitted that so far as licensors and licensees were concerned, a suit for the recovery of possession could be filed by a licensor even during the subsistence of the licence where the licence was revocable at will and had not been determined by a prior notice given by the licensor to the licensee, in which case, in Mr.Sanghvi's submission, the filing of the plaint would operate as a determination of the licence. The fallacy in this argument lies in this that since the very act of filing the suit would be a termination of the licence, the suit cannot be said to be a suit between a licensor and licensee between whom such relationship is subsisting. Further to put such a construction upon Section 41 and to confine it only to suits of this one particular class would be to render the section meaningless so far as suits between

landlords and tenants for the recovery of possession provided for in the said section are concerned, because under the law a tenancy cannot be determined in the manner in which a licence can be determined where there is no period provided for the licence and the licence is revocable at will. The use of the words "a licensor and licensee" and a "a landlord and tenant" in the said Section 41 has no such particular significance or effect as canvassed for by Mr.Sanghavi. These words have been used in accordance with a very well-settled and normal legislative drafting practice. In various statutes dealing with rights and obligations arising out of jural or contractual relationship and enforcement of such rights and obligations the parties are described by the legal character they bear. Thus, S.108 of the Transfer of Property Act, 1882, which deals with the rights and liabilities of lessor and lessee, by cl. (h) provides that "the lessee may even after the determination of the lease remove, at any time whilst he is in possession of the property leased but not afterwards, all things which he has attached to the earth...." Clause (i) of the said S.108 provides that "when a lease of uncertain duration determines by any means except the fault of the lessee, he or his legal representative is entitled to all the crops planted or sown by the lessee and growing upon the property when the lease determines, and to free ingress and egress to gather and carry them." Clause (h) and (i) use the word "lessee" in connection with the rights of a lessee even after the determination of the lease, because these rights which the lessee possesses in his character as a lessee and which came, into being by reason of the lease given to him. Certain rights he had during the continuance of the lease. Certain rights accrued to him on the determination of the lease. Rather than use the word "lessee" while the lease subsists and a clumsy terminology or a circumlocution to describe the same person after the lease has determined, following the well-settled legislative drafting practice, clauses (h) and (i) of Sec.108 refer to that

person in both eventualities by the word 'lessee'. Similarly, in various Matrimonial Acts when dealing with the grant of permanent alimony to a wife after divorce, these Acts provide that the Court may grant such alimony to the wife either at the time of the passing of the decree for divorce or on a subsequent application made to it for that purpose. The words used in the sections of the Matrimonial Acts are 'husband' and 'wife', even though after divorce the relationship of husband and wife between the divorced parties does not subsist. Examples of this will be found in S.37 of the Special Marriage Act, 1954; S.25 of the Hindu Marriage Act, 1955; S.37 of the Indian Divorce Act, 1869; and S.40 of the Parsi Marriage and Divorce Act, 1936. Words which describe a person's legal character- the character which he either holds or has once held- are used in statutes as a means of identification or a label to point out the particular rights and obligations which arise out of such relationship either during its subsistence or after its termination, that is, either are existing relationship or are erstwhile relationship. In the case of a lease, except where a tenant is a protected tenant under the Rent Act, there is an obligation upon the lessee to hand over possession of the property to the lessor on the expiry of the lease by efflux of time or its determination. Similarly, in the case of a licence there is an obligation upon a licensee to remove himself from the immovable property, in respect of which he has been given the licence, and to hand over possession of such property to his licensor. These are obligations which are imposed both upon the lessee and the licensee by law, irrespective of whether such obligations are stipulated for in the indenture of lease or the agreement of licence or not. In the particular case before us Cl.(14) of both the agreements of licence the first agreement dated June 20, 1968 and the second agreement dated July 4, 1969- provide that on the determination of the licence, the licensee, that is, the defendant, will give vacant possession of the licensed premises to the licensor, that is, the

> plaintiff. Even the absence of such a clause would have, however, made no difference, for the position in law would have been the same. There is thus equality no substance in the second point urged before us by Mr.Sanghavi.

13. It is clear from the observations of the Division Bench quoted above that the Division Bench has held that the words 'landlord' and 'tenant' are used in Section 41 as a means of identification or a label to point out particular rights and obligations which arise out of such relationship either during its subsistence or after its termination.

14. So far as the judgment of the Supreme Court on which reliance was placed by the learned Counsel appearing for the Defendant is concerned, namely the judgment of the Supreme Court in the case of R.V.Bhupal Prasad (supra). the Supreme Court has held that a tenant whose tenancy has been forfeited remains in possession as tenant at sufferance and is liable to ejectment in due course of law. In so far as the tenant whose tenancy has been terminated and who is liable to ejected in due course of law, the Legislature has made a special provision by enacting Section 41 which provides a speedy remedy to a landlord for a decree of eviction against his

erstwhile tenant. It is thus clear that the counter claim of the Defendant for a decree of eviction against the Plaintiff was not maintainable in this court in view of the provisions of Section 41 of the Presidency Small Cause Courts Act. As we have come to the conclusion that the counter claim of the Defendant for a decree of eviction against the Plaintiff was not maintainable in this court, we do not propose to decide two other submissions that were advanced on behalf of the Plaintiff.

15. In the result, therefore, we have no option but to allow the appeal filed by the Plaintiff and set aside the decree of possession passed by the learned single Judge in the counter claim filed by the Defendant.

16. Now taking up the Appeal filed by the Defendant challenging the decree of specific performance passed by the learned single Judge in favour of the Plaintiff and against the Defendant for

consideration, it was submitted on behalf of the learned Counsel appearing for the Defendant that the learned single Judge has considered principally only

one submission of the Defendant in so far as grant of decree of specific performance is concerned, namely whether the Plaintiff has proved that the Plaintiff is ready and willing to perform his part of the contract. The learned Counsel submits that though the learned single Judge considered the question whether the Plaintiff can be said to have encroached on the land belonging to the Defendant, but the learned single Judge has observed that the question whether the Plaintiff has encroached on any land belonging to the Defendant is not relevant for deciding the question whether the Plaintiff is entitled to a decree of specific performance of the contract. The learned Counsel submits that it was the contention of the Defendant that the Plaintiff has encroached on land belonging to the Defendant and therefore, the Plaintiff is not entitled to a decree of specific performance unless the land is measured in joint survey. The learned Counsel further submits that the learned single Judge has noted the contention of the Defendant that the Plaintiff is a company incorporated under the Companies Act and

Clause (7) gives option to the Plaintiff-company and therefore, unless there is a resolution passed by the

Plaintiff-company deciding to exercise the option given to it by clause (7) of the lease deed, it cannot be said that the option has been validly exercised. The learned single Judge has not decided that objection. The learned Counsel further submits that the learned single Judge has found that the Plaintiff is in possession of land in excess of 14912 sq.yards, still a decree of specific performance has been passed. He submits that on finding that the Plaintiff is in possession of land admeasuring 21564 sq.yards, the decree of specific performance should have been refused. The learned Counsel further urged that as the Plaintiff has not averred in the plaint that the Plaintiff is ready and willing to perform its part of the contract and as the witness of the Plaintiff no where makes a statement in the examination-in-chief that the Plaintiff is ready and willing to perform its part of the contract, the learned single Judge was not justified in recording a finding that the Plaintiff has proved that the Plaintiff was ready and willing to perform its part of the contract.

17. The learned Counsel appearing for the Plaintiff,

on the other hand, submits that there were only two contentions raised on behalf of the Defendant so far as the claim of the Plaintiff for a decree of specific performance is concerned, (i) that the Plaintiff is occupying excess land and that the Plaintiff has not pleaded nor has led evidence that they are willing to perform their part of the contract. The learned Counsel submitted that the learned single Judge was justified in holding that the question whether the Plaintiff is in possession of excess land is not relevant for the prayer for a decree of specific performance. The learned Counsel also relied on subsequent orders made by the authorities of the Survey Department including an order dated 30-2-2006. The learned Counsel relied on several judgments and submitted that the learned single Judge has rightly recorded the finding that the Plaintiff has proved that it is ready and willing to perform its part of the contract. The learned Counsel submits that a finding recorded by the learned single Judge that considering the amount that was to be paid and the financial position of the Plaintiff-company and the fact that it had made huge investment on the land in constructing a building and

installing machineries, no exception can be taken to the finding of the learned single Judge that the Plaintiff has proved that the Plaintiff was always ready and willing to perform its part of the contract.

18. It is common ground that the suit of the Plaintiff for a decree of specific performance arises out of Clause (7) of the lease Deed. Clause (7) of the lease deed reads as under:-

> 7. It is hereby agreed between the Lessees and Lessor that at any time within 20 years from the date of this Lease the Lessees for a consideration of Rs.82016/- which amount represents the present market value of the land and if and when the Lessees so elect and intimate to the Lessor in writing about their intention to purchase the same the Lessor shall within 4 months from the date of such intimation make out a marketable title of the said land to himself and execute a proper deed of conveyance in favour of the Lessees against the payment of the aforesaid amount free from encumbrances and liabilities whatsoever. In

> the event of such conveyance being executed the costs of and all incidental expenses to the execution thereof shall be borne by the parties in equal mainly except the costs of their respective legal advisers.

Perusal of the above quoted clause shows that an option has been given by this clause to the Plaintiff to purchase the entire demised premises from the Defendant for a consideration of Rs.82016/-. It is also an admitted position that that option was exercised by the Plaintiff by letter dated 3rd February, 1978. As per Clause (7), the option was to be exercised within 20 years of the date of the ease. It is an admitted position that the option was exercised by letter dated 3-2-1978 within the period of 20 years from the date of lease. Relevant portion of the letter dated 3-2-1978 reads as under:-

> "Please take notice that we are exercising our option and elect to purchase the demised land at or for a consideration of Rs.82,016.00 in conformity with the provisions of clause 7 of the said Indenture of Lease. You are to make

> out a marketable title of the said land and
>
> execute a proper Deed of Conveyance in your favour against payment of the stipulated price free from all encumbrances and liabilities. We are willing to pay our share of the costs charges and expenses.

This letter was replied to by the Defendant by his letter dated 10th May, 1978. In that letter the Defendant stated that he is owner of land admeasuring 21336 sq.yards. That he has leased out 14912 sq.yards of land to the Plaintiff. It was stated that after the survey was made by the Government the Defendant has found that the Plaintiff has encroached upon and taken possession of the land admeasuring 6424 sq.yards. It was stated that, therefore, it was necessary to have a joint survey to identify the land which is to be sold to the Plaintiff. The relevant portion reads as under:-

> "I am ready and willing to comply with the provisions of the lease Deed respect of the sale of land admeasuring 14,912 sq.yards. for a consideration of Rs.82,016.00.

> I am the owner of the land admeasuring 21,086.00 sq.yds. or 17841.2 sq.mtrs and I have leased out only 14912 sq.yds. out of the said land. But I found on survey of the land by the Government that your company has encroached upon and taken possession of land admeasuring 6424 sq.yds. and your company in using the same unauthorisedly and contrary to the provisions of the law and the lease deed. It is necessary to have a joint survey of the land in your company's occupation to identify the area of the land of 14912 sq.yds. to be sold to your company as per the said Lease Deed. So that I can make immediate steps to effect the sale."

It is clear from the above quoted statement in the letter dated 10th May, 1978 written by the Defendant that the Defendant was ready and willing to execute the sale-deed of the land of which lease was granted by the Defendant to the Plaintiff. The only dispute raised was that the Plaintiff is in possession of land in excess of 14912 sq.yards of land of which lease is granted. According to the Defendant, the

Plaintiff is in possession of land in excess of 14912 sq.yards, therefore the Plaintiff has to deliver possession of excess land to the Defendant and then the Defendant was willing to execute sale deed of the demised land in favour of the Plaintiff for the agreed consideration of Rs.82,016/-. Therefore, really speaking the only point on which inquiry was to be made was what is the extent of land in possession of the Plaintiff? Perusal of the lease deed shows that so far as the area of the land of which lease is granted is concerned, it is cause (1) which is relevant. Clause (1) reads as under,

> "the Lessor doth hereby demise unto the Lessors on lease all those pieces or parcels of land or ground containing by admeasurment on area of 14912 sq.yds. or thereabout situate at Agra Road, Nahur-Bhandup in Greater Bombay, within the registration Sub-District of Bandra District Bombay Suburban more particularly described in the schedule hereto. In the schedule it is stated "All that piece or parcel of land or ground containing by admeasurement 14912 sq.yards."

. Perusal of Clause (1) shows that lease of land admeasuring 14912 sq.yards or thereabout was agreed to be granted. Use of the phrase "thereabout" shows that the land of which lease was granted can be a few yards more than 14912 sq.yards or a few yards less. Perusal of Clause 7 of the lease deed shows that the option was given to the lessee to purchase the demised land. Therefore, while considering the question whether the Plaintiff is entitled to a decree of specific performance or not it was necessary for the Court to record a definite finding as to what is the area of the demised land. The observation of the learned Judge that the question whether the Plaintiff is in possession of any excess area is not relevant for deciding the issue of entitlement or otherwise of the Plaintiff to a decree of specific performance, in our opinion, is clearly wrong. In this regard it is pertinent to be noted that Clause (7) also mentions the purchase price to be paid by the Plaintiff. That price obviously is fixed with reference to the area of the demised land. The learned single Judge in the judgment has observed that because the lease deed uses the phrase "thereabout" in relation to the demised land, lease of definite area is not granted. The observation, in

our opinion, is erroneous. As observed above use of the phrase "thereabout" in relation to area mentioned in the lease deed may permit allowance of a few yards, but in our opinion, to hold that the lease deed which grants lease of land admeasuring 14912 sq.yards. or thereabout actually grants lease of land admeasuring 21069 sq.yards is absolutely unjustifiable. It is clear from the judgment of the learned single Judge that in the Sanads at Exh.1, property register card at Exh.2 show that the area of City Survey No.741, 741/1 to 741/7 is shown as 21564 sq.yards. Pursuant to Court's order the City Survey map of the above referred survey numbers was produced. That map also shows that the area of the above mentioned survey numbers is 21564 sq.yards. The learned Judge has also observed to the same effect. "Exh.S is the certified map of City Survey No.741, 741/1 to 7 in pursuance of the order of this Court in this suit and this map is relevant to show the boundary line of suit land which is shown in yellow colour. This map shows that the area of the suit land is 21564 sq.yards equal to 17,982.6 sq.mrts." Thus, from the material on the record of the learned single Judge it is clear that the area of the survey numbers in relation to which he has passed

a decree of specific performance was 21564 sq.yards. In view of this position of the record, by passing a decree of specific performance of a contract to sale the land admeasuring 14912 sq.yards or thereabout, the Defendant cannot be made to sale the land admeasuring 21564 sq.yards. The learned single Judge has referred to the description of the property in the lease deed and has held that the Plaintiff is entitled to the decree of specific performance of the contract, irrespective of the actual areas. Relevant observations in the judgment of the learned single Judge read thus:

> "All these circumstances would go to show that whatsoever area that was comprised within the boundaries shown in Schedule of property to the indenture of lease was agreed to be leased out to the Plaintiff and thereafter purchased in exercise of option. It appears that because of survey, the land came to be actually measured and found admeasuring more than that recited in the indenture of lease. That way the entire land comprised in the boundary shown in the schedule to the indenture of lease was intended to be leased

> out and was in fact leased out. The case of encroachment thereof, does not hold any water and cannot be accepted for a moment."

The learned single Judge failed to see that the price was fixed under the impression that the area is 14912 sq.yards. It is to be seen that the Defendant has stated that for the first time in 1967 he became aware that the area of these survey numbers is more. It means that when the lease was granted the Defendant was under the impression that the area of the survey numbers was 14912 sq.yards, it was subsequently found as a result of survey conducted by the Government that the area is in excess of 21000 sq.yards. In these circumstances, the learned single Judge ought to have considered the question whether the agreed consideration is adequate or not. In any case without applying mind to that aspect of the matter, a decree of specific performance should not have been made.

. At the hearing of this Appeal, on behalf of the Plaintiff a copy of the order passed by the Superintendent of Land Record, Mumbai Suburban District has been produced. In that order, it

appears that a finding has been recorded that the Defendant was owner of land admeasuring 14912 sq.yards only. A submission was made on behalf of the Defendant that they have challenged the order before the superior authority. Thus, so far as the city survey department is concerned, it is apparent that final decision has not yet been taken. In our opinion, however, the decision of the civil suit cannot be based solely on the basis of the orders that may be passed by the city survey officer from time to time. The court will have to find out on the basis of the evidence on record as to what is the exact area in possession of the Plaintiff. It is the case of the Plaintiff that the Plaintiff is in possession of land admeasuring 14912 sq.yards only as a lessee, and it is the case of the Defendant that the Plaintiff is in possession of land in excess of that area. Therefore, it was for the Plaintiff and the Defendant to lead evidence of expert witnesses, who have measured the land, to establish what was the land actually held by the Plaintiff as a lessee and a finding as to actual land in possession of the Plaintiff as a lessee could have been recorded by the learned single Judge only on the basis of the evidence led by the parties. It is clear from the

record that both the parties have not led any evidence either documentary or oral on this aspect of the matter. In our opinion, therefore, the decree passed by the learned single Judge cannot be sustained.

19. In our opinion, two more aspects which were relevant and which have not been properly considered by the learned single Judge are that a contention was specifically raised on behalf of the Defendant that under the lease deed option to purchase the land was given to the Plaintiff, the Plaintiff is a body corporate, therefore, a decision to exercise that option can be taken by that body corporate only by passing a resolution. But a resolution passed by the company taking decision to exercise the option under Clause (7) of the lease deed was never produced. This submission has been considered by the learned single Judge and has been rejected only by saying that the witness Mr.Sood is a secretary of the company and the deposition given by him before the court is not repudiate by the company. In our opinion, this is not a satisfactory answer. It was, in our opinion, for the Plaintiff to lead evidence to show either that the Plaintiff-company has passed a

resolution deciding to exercise the option given to it under Clause (7) or to produce material showing that that decision to exercise that option has been taken by any officer of the company, who was authorised either by the Memorandum of Association or Articles of Association of the Company or by a resolution of the company.

. Second aspect, in our opinion, which has been overlooked by the learned single Judge is that passing a decree of specific performance is in the discretion of the court. One relevant aspect, in our opinion, should have been considered by the learned single Judge while deciding to pass a decree of specific performance was the admitted conduct of the Plaintiff of stopping payment of rent after giving the purchase notice and thereby forfeiting its lease. The Plaintiff was entitled to purchase the property in its character as a lessee and if the Plaintiff allows that character itself to be forfeited by its default, the question, in our opinion, to be considered would be whether such a Plaintiff is entitled to claim a decree of specific performance, which is in the discretion of the court. We do not propose to express any final opinion either on this

aspect or the aspect considered earlier, because in our opinion, these aspects should be considered by the learned single Judge before passing a decree of specific performance in favour of the Plaintiff.

20. In our opinion, therefore, the decree of specific performance passed by the learned single Judge in favour of the Plaintiff is liable to be set aside. However, as observed above the most crucial aspect to be considered is the area of the land in possession of the Plaintiff and for recording a final finding on that aspect , in our opinion, additional evidence is necessary in view of the subsequent orders passed by the survey authorities. Considering the manner in which the suit was contested by both the sides, in our opinion, both the sides should be given an opportunity to lead further evidence in the matter. Therefore, we propose to remand the suit back to the learned single Judge for further hearing and decision in accordance with law.

21. In the result, therefore, both the appeals succeed and are allowed. The decree of possession passed in counter claim filed by the Defendant is set aside. It is held that this court does not have

jurisdiction to entertain the counter claim. The counter-claim is ,therefore, dismissed. The appeal filed by the Defendant challenging the decree of specific performance granted in favour of the Plaintiff is set aside. The suit of the Plaintiff is remanded back to the learned single Judge for further trial and decision in accordance with law and in the light of the observations made above. The parties shall bear their own costs.

(D.K.DESHMUKH, J.)

(J.H.BHATIA, J.)